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No. 69-5001

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1969

No. [redacted]

LYMAN A. MOORE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner Lyman A. Moore prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois affirming his conviction and death sentence.

REFERENCE TO REPORTS OF OPINIONS.

People v. *Moore*, 42 Ill. 2d 73, 246 N.E. 2d 299, is attached as an Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS.

The judgment of the Supreme Court of Illinois was entered on January 29, 1969. A timely petition for rehearing filed on February 19, 1969, was denied on March 25, 1969. Jurisdiction of this Court is invoked under Title 28, USC, sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

1. Petitioner was sentenced to death for murder. Six items of exonerating evidence were not disclosed to him at trial. The court below affirmed on the ground that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel at trial and no further request for disclosure was made. None of the exonerating items was contained in said file. Trial defense counsel were ignorant of the existence of the suppressed information.

Questions presented are:

(a) Whether a request is an indispensable prerequisite to disclosure of exonerating evidence by the State?

(b) Whether material evidence favorable to an accused should be disclosed by the State without a request where such evidence is not recorded?

(c) Whether denial of due process of law is contingent upon a request where a State knowingly permits false testimony to remain uncorrected?

(d) Where a prosecutor shows his entire file to defense counsel at trial, but none of the exonerating

items of evidence are contained in said file, does that satisfy the prosecution's duty of disclosure?

(e) Whether nondisclosure of the prosecuting police department is imputable to the prosecution?

2. Two witnesses made in-court identifications of the petitioner as the assailant. During cross examination, defense counsel sought to elicit the circumstances under which the witnesses first identified the accused. Prosecution objections were sustained on the ground that the questions went "beyond the examination in chief."

The questions presented are whether such restriction of cross examination

(a) denied the petitioner his constitutional right of confrontation under the Sixth Amendment?

(b) precluded the petitioner from exploring the admissibility of the in-court identification under *Stovall* v. *Denno*, 388 U.S. 293?

3. The deceased was killed with a twelve-gauge shotgun. The Chicago Scientific Crime Detection Laboratory determined that he was killed with a twelve-gauge shotgun. (A. 139.) The prosecutor stated in a Bill of Particulars that the murder weapon was a twelve-gauge shotgun. (A. 2.)

Over objection (A. 81-94), the prosecution introduced a sixteen-gauge shotgun into evidence. (A. 94.) The sixteen-gauge shotgun did not belong to the petitioner, was not recovered from him, and was never in his possession or control. (A. 58, 66-71.)

During closing argument the prosecutor told the jury that the sixteen-gauge shotgun was not the weapon that killed the deceased, but that any man who was with an-

other man who had the shotgun and shells for it was the type of person that deserved the death penalty. (A. 191-201, 204-206.)

The question presented is whether the introduction and use of such evidence, totally unconnected with the petitioner or the crime charged, denied the petitioner a fair trial?

4. Eight veniremen were removed for cause when they voiced general objections to capital punishment or stated that they had religious or conscientious scruples against the death penalty in a proper case.

In the light of *Witherspoon* v. *Illinois*, 391 U.S. 510, may a state court of review affirm a death sentence,

(a) on the ground that the tenor of *voir dire* examination was unlike that of *Witherspoon*?

(b) on the ground that the prosecution had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*?

CONSTITUTIONAL PROVISIONS INVOLVED.

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . be confronted with the witnesses against him . . . have the assistance of counsel for his defense."

Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life . . . without due process of law; . . ."

STATEMENT OF THE CASE.

At 10:00 P.M. on April 25, 1962, a bartender in Lansing ejected a profane customer from his tavern. (A. 25-26, 118-119.) At 10:55 P.M. that customer returned and shot him in the heart with a twelve-gauge shotgun. (A. 2, 26, 139.) Two days later, a man known only as "Slick" bragged that he had shot the bartender in Lansing. (A. 351.)

At the trial twenty-five months later, Patricia Hill, a waitress, identified your petitioner as the ejected customer who returned to the tavern and shot the bartender. (A. 25-26.) On cross examination defense counsel sought to elicit the circumstances under which she first identified the petitioner, but prosecution objections were sustained on the ground that the questions went "beyond the examination in chief." (A. 28, 31.) Henley Powell identified the petitioner as the man who came into the tavern and shot the bartender. Powell had not been in the tavern when the customer was ejected. (A. 32.) Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the petitioner by Henley Powell were sustained. (A. 38.)

A prosecution witness named Virgle Sanders identified the petitioner as the man known only as "Slick" who had bragged two days after the murder that he had shot a bartender in Lansing. (A. 44, 47.) A written statement that Virgle Sanders had given to the Lansing Police (A. 351) was *not* turned over to defense counsel for use on cross examination. (A. 41-50, 326-327, App. 14a-15a, 17a.)

Over objection, a sixteen-gauge shotgun was admitted in evidence (A. 81-94.) and used against petitioner. (A. 191-201, 204-206.) It was totally unconnected with the petitioner or the crime charged. (A. 58, 66-71.)

The defense presented the testimony of one Donald O'Brien who testified that petitioner was *not* the man ejected grom Zitek's tavern. (A. 114-116.) The head bartender and the general manager of Westmoreland Country Club in Wilmette, both testified, and the employment records of the Club showed, the petitioner was employed as a cocktail waiter until after midnight on the night of the murder. (A. 96-97, 99-103, 106-113.) Petitioner was paid overtime for that work. (A. 99, 106, App. 13a.)

Petitioner was found guilty (A. 218) and was sentenced to death. (A. 220.)

At a post-conviction hearing in January, 1967, it was shown that the Lansing Police and/or the prosecution had concealed six items of exonerating evidence from petitioner at trial:

1. Virgle Sanders' written statement to the Lansing Police which showed that he first met the man known as "Slick" on or about November 1, 1961, in Wanda and Del's tavern. (A. 351.)

   (Lyman Moore was in a federal penitentiary from February 18, 1957 until March 4, 1962. (A. 354.) When confronted at the post-conviction hearing with the fact that petitioner had been incarcerated in a federal penitentiary until March 4, 1962, Sanders admitted that it was *impossible* that petitioner was the man known only as "Slick" who had bragged that he had shot the bartender. (A. 296).)

2. The same night that the Lansing Police obtained Virgle Sanders' written statement they raided Wanda and Del's tavern looking for "Slick". Delbert Jones, the owner of Wanda and Del's told them that he knew and could identify "Slick". (A. 254.)

(Six months later when petitioner Lyman Moore was arrested (A. 58), the Lansing Police did *not* contact Delbert Jones for the purpose of having him view petitioner and identify him as the man known only as "Slick". (A. 255.).)

3. Right after Virgle Sanders supplied the name "Slick", the Lansing Police had an immediate suspect, James E. "Slick" Watts. A photograph of "Slick" Watts was contained in their file. (A. 275.) Chief Braschler assigned Lt. Turbin to look for "Slick" Watts. (A. 346.)

4. After petitioner Lyman Moore was arrested on October 31, 1962. (A. 58), the Lansing Police photographed him and took said photograph (A. 272, 361) to the home of William Leon Thompson. (A. 251.) William Leon Thompson used to patronize Wanda and Del's tavern in the autumn of 1961. He knew the owner of Wanda and Del's, Delbert Jones, and Virgle Sanders, and also knew and could identify the man known only as "Slick". He told Lt. Turbin and Sergeant Vandernoord of the Lansing Police that Lyman Moore did not resemble "Slick". (A. 255, 267, 273, 278.)

5. When Virgle Sanders first saw petitioner Lyman Moore at trial some twenty five months after the man known only as "Slick" had bragged that he had shot Bernie Zitek, he said to the Lansing Police officers in the presence of the prosecutors, "The guy

that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294.) The Lansing Police officers said, "Well, you know how those jail-house beans are." (A. 295.)

6. The Lansing Police file contained a diagram, drawn by a Lansing officer, that would have contradicted the prosecution witness Henley Powell and corroborated the defense witness Donald O'Brien; it showed Henley Powell seated with his back to the entrance through which the assailant entered. (A. 244-245, 260-261, 340-341, 357-358, 360.)

On appeal, the majority of the court below affirmed petitioner's conviction and death sentence but did not mention the unrebutted alibi evidence of two witnesses corroborated by work records; the majority held that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel during trial and no further request for disclosure was made (App. 7a.); that cross examination had not been restricted; that the sixteen-gauge shotgun had been properly admitted in evidence. (App. 4a.) *Sua sponte,* it held that *Witherspoon* v. *Illinois,* 391 U.S. 510, is not controlling at bar. (App. 8a-11a.)

On petition for rehearing, petitioner pointed out from the Record that the exonerating evidence was not contained in the prosecutor's file; that trial defense counsel were ignorant of the existence of the suppressed exonerating evidence, and could not reasonably be expected to request something that they did not know existed. (Pet. Reh. pp. 2-18); that the court had ignored his unrebutted

alibi evidence (Pet. Reh. p. 18); and that cross examination had been restricted. (Pet Reh. p. 19.) Petitioner attached to his petition for rehearing as an Appendix the *voir dire* examination of twelve prospective jurors, eight of whom had been removed for cause in violation of *Witherspoon* standards. (Pet. Reh. App. 1a-7a.)

Mr. Justice Walter V. Schaefer dissented on the grounds: (1) that the State had failed to prove the petitioner guilty beyond a reasonable doubt; (2) that a request is not an indispensable prerequisite to disclosure by the prosecution; that the duty of the prosecution to disclose exonerating evidence cannot be made contingent upon a request when the defense is ignorant of the existence of the suppressed information; that the suppressed exonerating evidence was not shown to be contained in the prosecutor's file; that nondisclosure denied petitioner fundamental fairness; that prejudice to the petitioner was identical whether the evidence was withheld by the prosecution or the police; (3) that the petitioner's right of cross examination had been restricted; (4) that a sixteen-gauge shotgun was improperly admitted in evidence since the prosecution had in its possession throughout the trial ballistic test results that showed that the deceased had been killed with a twelve-gauge shotgun and thus the sixteen-gauge shotgun was unsuitable for the commission of the homicide at bar.

The majority and dissenting opinions are attached hereto as an Appendix.

Execution of the death sentence has been stayed pending this Court's ruling upon the instant petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT.

Petitioner is under sentence of death for a murder that he could not have committed. But, the constitutional issues presented by the facts of record at bar reach far beyond the fate of this individual petitioner. If this conviction is permitted to stand, it will serve as an open invitation to police and prosecutors to treat a murder case as a sporting event, to hide exonerating evidence from any accused secure in the knowledge that if the accused does not request suppressed information that he does not know exists there is no duty to disclose it.

We come here now not for the purpose of seeking to extend the State's duty to disclose exonerating evidence, but merely to exact the promise of fundamental fairness that it holds forth.

1.

FAILURE OF THE STATE TO DISCLOSE SIX ITEMS OF EXONERATING EVIDENCE TO PETITIONER AT TRIAL DENIED HIM A FAIR TRIAL AND DUE PROCESS OF LAW.

Petitioner was sentenced to death for murder. (A. 220.) Six items of exonerating evidence were not disclosed to him at trial. (A. 58, 244-245, 251, 254-255, 260-261, 267, 271, 273, 275, 278, 283, 291, 293-296, 336-337, 340-341, 348, 351, 354, 357-358, 360.)

The court below affirmed petitioner's conviction and death sentence on the ground that none of the items concealed were requested by petitioner during trial, and that:

> "The record discloses that the assistant State's Attorney at the trial showed his entire file to the defense attorney and no further request for disclosure was made." (App. 7a.)

However, none of the exonerating items were contained in said prosecutor's file. (A. 244-245, 254-255, 266-267, 283, 291, 293-296, 320-324, 346, 366.) Trial defense counsel were ignorant of the existence of the suppressed information (A. 306-307, 310-311, 326-329), and could not reasonably be expected to make a request for evidence they did not know existed.

A. A Request Is Not An Indispensable Prerequisite To Disclosure Of Exonerating Evidence By The State.

Mr. Justice Walter V. Schaefer dissented in the case at bar. On this particular point, he stated:

> ". . . despite the language in *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, I do not believe that the Supreme Court intended to establish a request as an indispensable prerequisite to disclosure by the prosecution. Prior to *Brady* many courts had recognized the duty of the prosecution to disclose favorable, material evidence to the defense. And in many of those cases the defense did not know of the evidence and so had failed to request it. (*Mooney* v. *Holohan*, 294 U.S. 103, 79 L. Ed. 791; 55 S. Ct. 340; *Pyle* v. *Kansas*, 317 U.S. 213, 87 L. Ed. 214, 63 S. Ct. 177; *United States* v. *Dye* (3d cir. 1955), 221 F. 2d 763; *United States* v. *Baldi* (3d cir. 1952), 195 F. 2d 815.) In *Brady* the Supreme Court acknowledged the long-standing duty that rested upon the prosecution. In doing so, it used language appropriate to the decision of the case before it. Without an explicit holding to the contrary, I cannot believe that the Supreme Court intended to narrow the duty of the prosecution as it had existed prior to *Brady* by making that duty contingent upon a request when the defense is ignorant of the existence of the suppressed information. Essential fairness, rather than the ability of counsel

to ferret out concealed information, underlies the duty to disclose. *Brady* v. *Maryland,* 373 U.S. 83, 10 L. Ed. 215, 83 S. Ct. 1194; *Barbee* v. *Warden, Maryland Penitentiary* (4th cir. 1964), 331 F. 2d 842; *United States* v. *Wilkins* (2d cir. 1964), 326 F. 2d 135." (App. 17a-18a.)

B. Material Evidence Favorable To An Accused Should Be Disclosed Without A Request Where Such Evidence Is Not Recorded.

Four of the six items of exonerating evidence were not even *recorded.* (A. 254-255, 346, 266, 294-295.)

Certainly as regards 4 items of unrecorded exculpatory evidence, the defense could not reasonably have been expected to request them. "If the defense does not know of the existence of the evidence, it may not be able to request its production." (*Giles* v. *Maryland,* 386 U.S. 66, at page 102, concurring opinion.)

Without exception, the federal courts of appeals that have interpreted *Brady* have held that the duty to disclose favorable evidence does not turn upon a request. It seems to us that the underlying policy consideration is the awesome disparity between the State's investigative machinery and that of an individual accused. Therefore, it seems to us that the majority opinion below is legally unsound.

C. Where A Prosecutor Shows His File To Defense Counsel, But None Of The Suppressed Information Is Contained In Said File, That Does Not Satisfy The State's Duty Of Disclosure.

Moreover, we submit that a defense counsel who looks at a prosecutor's file should be able to rely upon the inarticulated representation that everything material or

relevant to the case is contained in that file. If exonerating information is not contained in the prosecutor's file, the defense is misled. (Cf. *Jackson* v. *Wainwright*, 390 F. 2d 288, 298.)

D. Only By Ignoring The Indisputable Facts Of Record At Bar Could The Majority Hold That There Was No Request.

Not only did Mr. Justice Schaefer dissent on the ground that nondisclosure denied this petitioner the fundamental fairness guaranteed by the constitution, citing *Brady* v. *Maryland*, 373 U.S. 83 and *United States* v. *Wilkins*, 326 F. 2d 135, but he commented further:

> "The majority, however, disposes of this issue upon the ground that the defendant failed to request the evidence which was suppressed. This ground is neither factually nor legally sound. Prior to the trial the defendant had demanded copies of the grand jury minutes and of all statements made to the Lansing police. The motion was allowed only to the extent of providing the defendant with the statement of each witness who testified at the close of his direct examination. No statement of Virgle Sanders was supplied. Although, as the majority points out, the prosecuting attorney offered his file to the defense at the trial, that attorney was unable to recall whether the items here involved were in that file. The defendant's attorney testified that none of these items was disclosed to him." (App. 17a.)

On Monday, November 18, 1963, six months prior to the trial, the defense filed a formal written motion demanding a copy of the grand jury minutes and any and all written statements in the possession of the Lansing Police taken from complaining witnesses or any other witnesses subsequent to the offense set out in the indict-

ment. (A. 5.) What more could defense counsel request? Should he have asked for any and all information that the police and the prosecutors intended to suppress? Must any accused assume that the police and the prosecution will suppress anything not requested? Is the burden upon the accused to assume that the State will ignore Canon 5?

E. The Six Items Of Concealed Evidence Would Have Been Favorable And Material To The Defense.

Six items of exonerating evidence were concealed from the petitioner at the trial. They were brought to light at various times subsequent to the trial, and were formally established in the record at a post-conviction hearing on January 11th and 12th, 1967.

Five of the items of exonerating evidence directly and indirectly concern the prosecution witness Virgle Sanders. Virgle Sanders testified at the trial that the petitioner Lyman Moore was the man that he knew only as "Slick"; that on April 27, 1962, at 2:30 P.M., he saw him in the Ponderosa Tap in Dolton (A. 41-42.) at which time he said, "Hey Virgle, it's open season on bartenders. I shot one in Lansing Wednesday night". (A. 44, 47.)

The five items are as follows:

(1) On April 30, 1962, at 8:50 P.M., Virgle Sanders gave a written statement to the Lansing Police in which he stated that he had first met "Slick" "about six months ago." (A. 351.)

(The significance of that statement is the petitioner Lyman Moore was in federal prison at that time. The Lansing Police received an F.B.I. report in November, 1962 (A. 241), that showed Lyman

Moore in a federal penitentiary from February 18, 1957, until March 4, 1962. (A. 354.)

Petitioner's written pretrial demand for a copy of all statements made to the Lansing Police (A. 4-9.) was denied on the representation of the prosecutor that all statements of prosecution witnesses would be supplied to the defense after the direct examination of each. (A. 7-9.)

Copies of written statements to the Lansing Police of prosecution witnesses Hill and Powell were supplied to the defense at the close of their direct examinations. (A. 28, 33.) But, Virgle Sanders' written statement was *not* supplied to the defense for cross examination (A. 47-50, 326-327, App. 12), in spite of the *trial* prosecutor's representation that it would be supplied. (A. 7-9.)

At the post-conviction hearing on January 11, 1967, Virgle Sanders testified definitely that he saw the man that he knew as "Slick" in Wanda and Del's tavern before Christmas of 1961. (A. 295.) When confronted with the fact that the petitioner Lyman Moore had been incarcerated in a federal penitentiary until March 4, 1962, he admitted that it was *impossible* for Lyman Moore to be the man that he knew as "Slick" who two days after the murder had bragged that he had shot the bartender in Lansing. (A. 296, App. 15a.).)

(2) On April 30, 1962, shortly after Virgle Sanders had given his written statement to the Lansing Police, the Lansing Police raided Wanda and Del's tavern in Chicago, looking for "Slick". The owner-bartender, Delbert Jones, told them that he knew and could identify the man known as "Slick". (A. 254.)

(Six months later, when the petitioner Lyman Moore was arrested (A. 78), the Lansing Police did *not* contact Delbert Jones for the purpose of having him view the petitioner to identify him as the man known as "Slick". (A. 255, 336-337.)

At the post-conviction hearing, Delbert Jones identified a photograph of James E. Watts (A. 274, 362) as the man known as "Slick" that used to come into his tavern in the autumn or fall of 1961. (A. 332, 334-335.) He also testified that he was shown a photograph of Lyman Moore and said he was not "Slick". (A. 333.) He saw Lyman Moore in person in the Cook County Jail on December 23, 1964, and said that he was not "Slick". (A. 337.)

A prosecution objection on the ground that defense counsel was not permitted to prove the petitioner innocent in a post-conviction hearing was sustained (A. 337), and Delbert Jones' testimony was stricken en toto. (A. 338.).)

(3) May 1, 1962, or shortly thereafter, the Lansing Police had an immediate suspect, James E. "Slick" Watts. They had a photograph of "Slick" Watts in their file on the Zitek murder case. (A. 275.) Chief Braschler assigned Lt. Turbin to look for "Slick" Watts. (A. 346.)

(The photograph was discovered after the post-conviction petition was filed. (A. 335.) The fact that Chief Braschler considered James E. "Slick" Watts such a good suspect that he assigned Lt. Turbin to "look for" him was not brought to light until January 12, 1967, when Chief Braschler testified in the post-conviction hearing. (A. 346.).)

(4) On November 1 or 2, 1962, the Lansing Police took a photograph of the petitioner Lyman Moore to the

home of William Leon Thompson. (A. 251, 272, 361.) William Leon Thompson used to patronize Wanda and Del's tavern in the autumn of 1961. He knew Delbert Jones, the owner of Wanda and Del's, and he knew Virgle Sanders. He also knew and could identify the patron of Wanda and Del's who was known only by his nickname "Slick". He told Lt. Turbin and Sergeant Vandernoord of the Lansing Police that Lyman Moore did not resemble "Slick". (A. 255, 267, 273, 278.)

(This visit to Thompson's home and his statement that Lyman Moore did not resemble "Slick" was not disclosed to the defense at trial; it was not even recorded. (A. 266.)

The Lansing Police had spoken to Thompson in the Ponderosa tavern three days after the homicide, at which time he told them that he had heard about the bragging incident by "Slick" on the previous afternoon. (A. 265, 281-284.) And the Lansing Police knew that Virgle Sanders, Delbert Jones, and William Leon Thompson all knew each other and that each knew "Slick". (A. 254, 283, 291, 293, 336.)

Delbert Jones, the owner of Wanda and Del's tavern, was never brought in to view Lyman Moore by the Lansing Police, nor was he shown the photograph of him that was shown to Thompson. (A. 336-337, 348.)

[Long after the trial, when Delbert Jones was shown the same photograph of Lyman Moore by defense counsel, and when he viewed Lyman Moore in person in the County Jail on December 23, 1964, he said that Lyman Moore was not "Slick". (A. 333, 337.).]

Virgle Sanders was not permitted to look at Lyman Moore until May 13, 1964, over two years later, when he was brought to court to testify at the trial. (A. 294.).)

(5) On May 13, 1964, when Virgle Sanders was brought to court to testify at the trial, when he first saw Lyman Moore he said to Lt. Turbin and other Lansing police officers, in the presence of the prosecutors, "The guy that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294.) The Lansing police officers said, "Well, you know how those jailhouse beans are." (A. 295.)

(The fact of actively encouraging Virgle Sanders to falsely identify the petitioner as "Slick" was never recorded in any file. It was not revealed to the defense at trial; it first came to light on June 12, 1965 (A. 291); and it was formally established in the record on January 11, 1967, at the post-conviction hearing. (A. 294-295.).)

The sixth item of exonerating evidence concerned the prosecution witness Henley Powell, who testified that he was playing pinochle with Donald O'Brien and two other men in Zitek's tavern at the time of the shooting; that he saw the shooting because he was seated facing the bartender with a view of the entrance. (A. 32, 34.)

Donald O'Brien, a defense witness, testified that Henley Powell was seated with his back to the entrance, looking towards the other end of the tavern. (A. 120.)

(6) The Lansing Police file contained a diagram, drawn by a Lansing police officer, which diagram contradicts the prosecution witness Henley Powell and corroborates the defense witness Donald O'Brien; it shows

Henley Powell seated with his back to the entrance through which the assailant entered. (A. 244-245, 260-261, 340-341, 357-358, 360.)

(At the post-conviction hearing the prosecutor did not recall ever having seen said diagram. (A. 327.) Both defense counsel testified that said diagram was not supplied to them at the trial. (A. 307, 328.)

The diagram first came to light some time subsequent to April 29, 1966 (A. 239) and was admitted in evidence at the post conviction hearing on January 11, 1967. (A. 244-245.) It shows that Henley Powell was seated with his back to the entrance through which the assailant entered. (A. 357-358, 360.).)

F. Nondisclosure Of Material Evidence Favorable To The Accused By The Prosecuting Police Department Is Imputable To The Prosecution.

The court below seemed to recognize that much of the exonerating evidence was concealed by the Lansing Police not only from the petitioner but also from the prosecutors:

> "... it does not appear that any error in the testimony was known to the prosecution." (App. 8a.)

However, we submit that the correct view regarding the denial of this petitioner's federal constitutional rights is expressed by Mr. Justice Schaefer in his dissenting opinion:

> "... the prejudice to the defendant is identical whether the evidence is withheld by the prosecutor or by the police." (App. 18a, citing *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842.)

G. Where A State Knowingly Permits False Testimony To Remain Uncorrected, That Is A Denial Of Due Process Of Law Regardless Of Whether There Was Any Prior Request.

On appeal petitioner argued that the State had suffered false testimony to remain uncorrected. The court below recognized the fact that Powell was mistaken as to which direction he was facing at the time of the homicide but held, "Such contradictions in testimony go to the weight of the evidence and do not in any way indicate perjury." (App. 8a.)

The fallacy to that kind of reasoning is that after twenty-five months Henley Powell might have honestly believed what he testified to, but the Lansing Police knew better because of the diagram in their file that showed he was mistaken or lying. And the jury had no opportunity to *weigh* the diagram that contradicted Powell and corroborated O'Brien. See, *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842.

The court below missed the thrust of *Alcorta* v. *Texas,* 355 U.S. 28, *Napue* v. *Illinois,* 360 U.S. 264, and *Miller* v. *Pate,* 386 U.S. 1, when it held:

> "Sanders testified that the defendant was the man he knew as 'Slick'. Even though it appears that he said he had met Slick at a time that Moore was in fact in prison, and that other people did not know Moore as 'Slick', and the fact that Sanders had first stated that the man he knew as 'Slick' was about 30 or 40 pounds heavier than Moore does not indicate perjury, but mere testimonial inconsistency." (App. 8a.)

The jury that sat in judgment of this petitioner was not permitted to hear one word of the "mere testimonial inconsistency", because the police *and* the prosecutors

who had concealed it from the jury did *not* bring it to the attention of the jury.

The test to be applied in such cases is whether the testimony may have had an effect on the outcome of the trial. Even the dissenting opinion in *Giles* v. *Maryland*, 386 U.S. 66, at page 116, agrees that that is the standard:

> "The Court has held since *Mooney* v. *Holohan*, 294 U.S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, that a State's knowing use of perjured testimony denies a fair trial to the accused. Mooney has been understood to include cases in which a State knowingly permits false testimony to remain uncorrected. *Alcorta* v. *Texas*, 355 U.S. 28, 2 L. ed. 2d 9, 78 S. Ct. 1173. The standard applied in such cases has been whether the testimony 'may have had an effect on the outcome of the trial.' *Napue* v. *Illinois*, supra, 360 U.S. at 272, 3 L. ed. 2d at 1223. These cases were very recently followed and applied in *Miller* v. *Pate*, 386 U.S. 1, 17 L. ed. 2d 690, 87 S. Ct. 785."

H. What Kind Of A Trial Would The Jury Have Heard If All Of The Undisclosed Evidence Had Been Presented?

Patricia Hill would have made her in-court identification of the defendant as the man who was ejected from Zitek's Tavern at 10:00 P.M. and who returned at 10:55 P.M. and shot Bernie Zitek in the heart with a shotgun. (A. 25-26)

Henley Powell would have made an in-court identification of the defendant as the assailant. (A. 32-33.) But, evidence would have been introduced in the form of a diagram drawn by a Lansing police officer on the night of the homicide to show that he was sitting with his back

to the entrance, indicating that he could not have seen the killing. (A. 260-261, 340-341.)

Virgle Sanders would have testified as he did that he knew the defendant sitting in Court; that he knew him only by the nickname "Slick"; that he saw him in the Ponderosa Tap in Dolton on April 27, 1962, at 2:30 or 3:00 P.M. (A. 41-42); that the defendant said, "It's open season on bartenders. I shot a bartender in Lansing." (A. 47.)

On cross examination it would have been shown that the first time that Sanders was asked to view the defendant was that day in court; that when he first saw him he said that the guy he knew as Slick looked to be about 30 or 40 pounds heavier than the defendant; that the Lansing police said, "Well, you know how those jailhouse beans are." (A. 295.) It would have been established that Delbert Jones, the owner of Wanda and Del's tavern, knew Sanders and "Slick" and also William Leon Thompson. The witness would have been asked to verify the fact that he first met "Slick" in Wanda and Del's before Christmas of 1961. (A. 295.) He would have been shown the F.B.I. report indicating that Lyman Moore was in federal prison in Leavenworth, until March 4, 1962, and he would have replied as he did in the post-conviction hearing, "If he's in jail, it would have been impossible to be the same man." (A. 296.)

Chief Braschler would have been called to testify that the Lansing police had an immediate suspect by the name of Slick Watts, James E. "Slick" Watts; that he had assigned Lt. Turbin to "look for" Slick Watts. (A. 346.)

Delbert Jones would have been called to testify that he knew a man called "Slick" that used to frequent his tavern Wanda and Del's; that the defendant in court

was not the man called "Slick". (A. 337.) He would have been shown a photograph of James E. Watts and would have testified that Watts was the man called "Slick". (A. 334.)

William Leon Thompson would have been called to testify that he knew Virgle Sanders (A. 271), Delbert Jones, the owner of Wanda and Del's tavern, and a man called "Slick" that used to frequent that tavern. He would have been asked to look at the defendant in court and he would have testified that the defendant was not the man that he knew as "Slick". (A. 273.) He would have been shown a photograph of James E. Watts, and he would have testified that Watts was the man he knew as "Slick". (A. 274, 275, 276, 277.)

Then, Donald O'Brien would have been called to testify as he did that he heard the shot but did not see the assailant; but that the defendant was definitely not the man that Bernie Zitek had ejected at 10:00 P.M. (A. 117.)

In addition to all that of course there would be presented the testimony of two disinterested respectable alibi witnesses who would have testified as they did that the defendant was at work over fifty miles away at the time of the crime. (A. 96, 106.) The alibi was corroborated by work records. (A. 99, 106, 109, 113.)

Had the jury heard all the evidence, including the evidence that was not disclosed, it may have found the petitioner not guilty.

Mr. Justice Schaefer concluded from the trial record alone, even without the exculpatory evidence that was not discovered, that the State had failed to prove the petitioner guilty beyond a reasonable doubt. (App. 13a-14a.)

2.

IT IS AN UNCONSTITUTIONAL RESTRICTION OF CROSS EXAMINATION TO PRECLUDE AN ACCUSED FROM ELICITING THE CIRCUMSTANCES UNDER WHICH IDENTIFYING WITNESSES FIRST IDENTIFIED HIM.

At the trial twenty-five months after the murder, a waitress named Patricia Hill identified the petitioner Lyman Moore as the ejected customer who returned to Zitek's tavern and shot the bartender. (A. 25-26.) During cross examination, defense counsel sought to elicit the circumstances under which Patricia Hill first identified the petitioner, but prosecution objections were sustained on the ground that the questions went "beyond the examination in chief." (A. 28, 31.)

Henley Powell identified the petitioner as the man who came into the tavern and shot the bartender. Powell had not been in the tavern when the customer was ejected. (A. 32.) Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the petitioner by Henley Powell were sustained. (A. 37-38.)

Mr. Justice Schaefer said in his dissenting opinion, the rulings restricting cross examination and precluding inquiry into the circumstances of the initial identification of petitioner by Patricia Hill and Henley Powell were erroneous, because "the circumstances of an identification clearly relate to its weight." (App. 13a.)

What good is the right of confrontation if an accused is foreclosed from inquiring on cross examination into the circumstances of the initial identification to explain, modify or discredit the in-court identification? And that is precisely what happened to this petitioner; he was fore-

closed: "Objection sustained. Don't refer to that anymore." (A. 31.)

The restriction of cross examination in the case at bar is not merely academic. The record shows that Patricia Hill attended two lineups in which the petitioner Lyman Moore appeared on two successive days. Petitioner was arrested in Chicago on October 31, 1962, at 5:30 A.M. (A. 78.) and taken to the Burnside police station. (A. 71.) Patricia Hill attended a line-up at the Burnside police station on the night of October 31, 1962. (A. 31, 145.) The record does *not* reflect that she identified the petitioner at that line-up. Indeed, why did the prosecution object to inquiry into that line-up?

The very next day, November 1, 1962, Patricia Hill viewed a second line-up at the Burnside police station, in which the petitioner appeared. She was accompanied by Donald O'Brien and five other male patrons of Zitek's tavern. None of those six men identified the petitioner Lyman Moore. (A. 116.) Why was it necessary to bring Patricia Hill to *two* line-ups? Is it not reasonable to infer that the results of the first line-up were unsatisfactory to the police?

Numerous questions suggest themselves. Who notified Patricia Hill to come to the Burnside police station in Chicago? What was said to her at the time of notification? How did she get to the Burnside police station? Who was with her? What was said to her? Did she identify the petitioner as the assailant that night? What did she say? To whom? What was said in return? How did she get home from the station? Why did she return the following day? Who asked her to return the following day? What was said to her? Who were the five other

men beside Donald O'Brien (A. 116.) that accompanied her to that second line-up and failed to identify anyone in it? Were the same people in the second line-up?

Regarding Henley Powell: When was the first time he ever laid eyes on the petitioner after the shooting? What did he say? And, so on.

This line of inquiry was cut off at the threshold on the ground that it went "beyond the examination in chief." (A. 28, 31.) As your Honors said in *Smith* v. *Illinois*, 390 U.S. 129, 131:

> "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross examination itself."

Moreover, the evil of foreclosing cross examination at the threshold goes beyond a question of weight; it precludes even questioning the admissibility of the in-court identification.

In some cases, judged by the "totality of circumstances," the conduct of pretrial confrontation procedures may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law. *Stovall* v. *Denno*, 388 U.S. 293, 302; *Foster* v. *California*, ... U.S. ....., 5 CrL 3001.

That right was also foreclosed.

Why was it necessary to bring Patricia Hill to two line-ups on successive days?

Was Henley Powell ever brought to a line-up in which the petitioner appeared? If not, why not?

This Court has seen fit to reverse even in the absence of prejudice where cross examination is restricted.

(*Brookhart* v. *Janis*, 381 U.S. 1, 3.) In the light of that case, *Pointer* v. *Texas*, 380 U.S. 400, and *Smith* v. *Illinois*, 390 U.S. 129, the facts of record at bar present an *a fortiori* case.

3.

WHERE THE DECEASED WAS KILLED WITH A TWELVE-GAUGE SHOTGUN, THE INTRODUCTION AND USE OF A SIXTEEN-GAUGE SHOTGUN TOTALLY UNCONNECTED WITH PETITIONER OR THE CRIME CHARGED, DENIED PETITIONER A FAIR TRIAL AND DUE PROCESS OF LAW.

The deceased was killed with a twelve-gauge shotgun. (A. 2, 139.)

A sixteen-gauge shotgun, totally unconnected with petitioner (A. 58, 66-71), was admitted in evidence over his objection. (A. 81-94.)

The prosecutor used that irrelevant evidence with devastating effect against petitioner. He told the jury that the sixteen-gauge shotgun was not the weapon that killed the bartender. But, he argued that any man who was with another man who had such a weapon and shells for it, was the type of person that deserved the death penalty. (A. 199-201, 204-206.)

The majority of the court below held:

> "There is no clear evidence of the weapon actually used in this homicide, although it is clear that it was a shotgun. We have consistently held that a weapon found upon a defendant suitable for the commission of the crime charged is proper evidence even though there is no showing that it was the actual weapon used. (Citing cases.)" (App. 4a.)

Mr. Justice Schaefer dissented on the ground that in the cases cited by the majority no ballistic evidence was

available, and therefore the suitability of the weapon could be established only by physical description, but that in the case at bar the prosecution had ballistic test results which showed that the bartender was shot with a twelve-gauge shotgun; that the sixteen-gauge shotgun was unsuitable for the commission of the murder. (App. 14a.) And, of course, Mr. Justice Schaefer is right. One could not get a twelve-gauge shotgun shell into a sixteen-gauge shotgun with a hydraulic press!

The dissenting opinion also pointed out that the sixteen-gauge shotgun was never in the possession or control of the petitioner. (App. 14a.) The record verifies that observation. It did not belong to the petitioner and was not recovered from him. It was recovered from a 1957 Ford automobile (A. 58, 66-71) owned by a man named Barbee. (A. 68.) The sawed-off barrel was recovered from Barbee's home. (A. 77.)

Since the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon that killed the bartender (A. 137-138, 200, 202, 204-205), the only reason it was introduced and used against petitioner was to denounce him as a bad man, without regard to his guilt of the crime charged. (A. 199-201, 204-206.)

This seems to be a case of first impression. We can find no case in which a weapon totally unconnected with the accused or the crime charged has been held admissible in evidence. The closest analogy that we can find is in cases involving prior convictions.

"While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising su-

pervisory power over criminal trial in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." (*Spencer* v. *Texas,* 385 U.S. 554, at 572-575, dissenting opinion, and cases cited therein.)

The case at bar presents an *a fortiori* situation. As the majority opinion in *Spencer* v. *Texas* points out, "under recidivist statutes, the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence. The defendant's interests are protected by limiting instructions, . . ." (385 U.S. 554, at 561.)

In the case at bar, there were no limiting instructions. Indeed, there could not have been any. Either the sixteen-gauge shotgun was relevant to the question of guilt or innocence of the crime charged, or it wasn't. The dissenting opinion holds, and the record shows, that it was not.

It is pure sophistry to hold that there is no clear evidence of *the weapon* actually used to this homicide (App. 4a.) when the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon used to kill the deceased. (A. 137-138, 200, 202, 204-205.)

It *was* used in an attempt to kill the petitioner.

In Illinois, a jury may impose a death penalty for any reason or for no reason. There are no rules or standards to guide the jury; it can select or reject a death penalty as it sees fit. (*Witherspoon* v. *Illinois,* 391 U.S. 510; *People* v. *Bernette,* 30 Ill. 2d 359, 370.)

Here are a few excerpts from the prosecutor's closing argument that demonstrate how he used the sixteen-gauge shotgun to obtain a death penalty verdict from the jury:

> Mr. Fleming: Now, he stated to you about the most important witness in this case is this shotgun. And he said this shotgun was found again in a car that was not owned by this defendant. But it was a car that this defendant—and again this man with the mustache were arrested getting in the automobile.
>
> They say this is a 16, which it is, it is a 16. And we stipulated that the pellets, if the expert would have testified that in his opinion they would have been from a twelve-gauge shotgun. He said because this is a 16 and because the pellets came from a twelve-gauge shotgun, really this is the most important thing in this case.
>
> We never contended and we don't now, and the evidence doesn't show it, that this is the shotgun that killed Bernard Zitek. He said, well, this is the thing and the reason why you should go back and find this man not guilty.
>
> Lyman Moore, I submit to you, is that type of defendant that knows when he shoots a bartender and kills that bartender, about the only way for him to get out of it is to toss the shotgun he shot the bartender with in a creek, bury it, burn it or something else, because he knows if he ever gets caught with that shotgun he is absolutely a goner.
>
> This is not the shotgun that killed Bernard Zitek, there is no question about it. But one thing we know from this shotgun being in that car—let me have those pellets—that the man with the mustache again

and Lyman Moore are those kind of people that use shotguns.

And take a look at those, folks, these are in evidence so you can look at them. You see this shell here, it has a ballbearing at the end of it. I wonder what they were going hunting for with this. Pheasants? You shoot deer with this in Wisconsin and Michigan. The other three are goose shot, number 4's. You shoot geese in Canada with that; you don't hunt pheasants in Illinois or target practice with these things, you kill things with this. There is a ballbearing at the end of this, and that is what was in this weapon when it was found in the car as Lyman Moore and this other man went to get into it. (A. 199-201.)

* * * * *

Is it the type of case where the person has a fight, —and when I say a fight, he uses abusive language at a bartender and the bartender, because he uses this abusive language, tells him he is going to get kicked out, is it reason enough for a man to come back with that shotgun or one like it, it wasn't this one it was one like it, and kill that person?

Is it reason enough to come back an hour later with the shotgun, a loaded shotgun, and kill that person? These are the things you take into consideration.

The next thing you take into consideration is when Moore came back at 11:00 o'clock, walked into the bar with a shotgun, they said it was a single barrel shotgun, cold-bloodedly placed the shotgun on the bar, aimed it at the bartender, pulled the trigger and then left. That is what he did.

Is this the type of case that deserves a recommendation of the death penalty? Take into consideration this, and this is in evidence. This is a shotgun, this is a sixteen-gauge shotgun. A twelve-gauge shotgun killed Bernie Zitek. Is the shotgun the most humane type weapon that if someone were to kill another person or shoot them, is this the type of weapon that you would say well, he didn't have the right to kill him but at least it was a clean death.

You heard Doctor Wagner testify. He testified that this—when I say "this" I am not referring to this specifically but a shot gun shell entered his right chest and all the beebees went all over and his heart exploded and that's why he died. Is this the way people should die? Is this the kind of case that deserves the death penalty? (A. 204-205.)

* * * * *

Is the death penalty the type of penalty that is appropriate for shotguns loaded with ballbearings? Is the death penalty appropriate in this type of case where a weapon such as this, not a pistol, not a revolver, an automatic or a rifle, not a club was used but a hard, cold shotgun that shoots a slug about the size of this. Is this the type of case?" (A. 206.)

Even if Illinois had rules or standards to guide a jury in determining whether to impose the death penalty, and regardless of the outcome of *Maxwell* v. *Bishop*, No. 622, now pending in this Honorable Court, we seriously doubt that Illinois could constitutionally enact a rule or standard that a jury could take into consideration a weapon not used in the commission of the offense charged which was found in the automobile of an associate or friend of the accused, even though the evidence

showed no access, possession or control of the weapon by the accused.

4.

THE DEATH SENTENCE IN THE CASE AT BAR CANNOT BE CONSTITUTIONALLY EXECUTED BECAUSE IT WAS IMPOSED BY A JURY FROM WHICH HAD BEEN REMOVED FOR CAUSE THOSE WHO, WITHOUT MORE, WERE OPPOSED TO CAPITAL PUNISHMENT OR HAD CONSCIENTIOUS SCRUPLES AGAINST IMPOSING THE DEATH PENALTY.

Apparently, in the absence of another clear expression by this Court, Illinois intends to apply the *Witherspoon* doctrine only to Witherspoon.

The court below held:

> "On *voir dire* in this case each juror was asked in substance: Do you have any religious or conscientious scruples against the infliction of the death penalty in the proper case? Twelve jurors positively asserted that they had such scruples and were excused for cause without motion by the State or objection by the defendant.
>
> The tenor of the entire examination, however, was unlike *Witherspoon* where the trial court promptly removed all who expressed the slightest qualms about capital punishment." (App. 8a-9a.)

Relying heavily on its decision in *People* v. *Speck*, 41 Ill. 2d 177, the court below makes the gossamer distinction that wholesale removal of prospective jurors for cause proscribed by *Witherspoon* becomes constitutionally permissible if done on a retail basis. (App. 8a-11a.) But, we say that the damge is precisely the same no matter how slowly or deliberately the *Witherspoon* doctrine is violated.

Clearly, emphatically, and categorically, your Honors said in *Witherspoon*:

> "Specifically, we hold that a death sentence cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon* v. *Illinois*, 391 U.S. 510, 522.)

That language was plain enough for the California Supreme Court to hold that reversal of a death sentence is automatically required if a single venireman was improperly excused for cause on the basis of his opposition to the death penalty. *In re Anderson*, 73 Cal. Rptr. 21 (11-18-68).

On April 2, 1969, this Court made it crystal clear that it meant just what it said in the *Witherspoon* case. *Boulden* v. *Holman*, ... U.S. ....., 5 CrL 3013. In a 7 to 1 decision, the case was remanded to the District Court for hearing, citing footnotes 9 and 21 of *Witherspoon*.

The court below also held that the State had sufficient peremptory challenges remaining to have eliminated those prospective jurors eligible to serve under *Witherspoon*. (App. 11a.)

The record refutes that holding.

Each side had 20 peremptory challenges under the statute. (Ill. Rev. Stat. 1963, chap. 38, par. 115-4 (e).) The prosecution had exercised 16 peremptory challenges. (Trial Record, pp. 146, 162, 242, 242, 242, 269, 277, 281, 303, 322, 322, 329, 329, 342, 346, 350.) There were 8 prospective jurors removed for cause clearly in violation of *Witherspoon* standards:

EXCERPTS FROM THE RECORD ON VOIR DIRE EXAMINATION.

Page of Record

118 ESTHER BYRNE, prospective juror:

122 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, ordinarily enough, I take the same stand as Mr. Byrne. I don't believe in capital punishment.

Q. In other words, even if we have a law in this State to that effect, you wouldn't believe in it, anyway?

A. No, I don't, definitely not.

The Court: Very well. That's your prerogative. You're excused for cause.

LOUIS LORENS, prospective juror:

151 Q. Do you know of any reason why you cannot
152 be a fair and impartial juror in this case?

A. I do not believe in capital punishment.

The Court: Well, step down.

(Prospective juror excused.)

210 KATHERINE KRISTOCK, prospective juror:

212 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I'm afraid I do. I don't believe in capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

MARIAN PETERSON, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I have very strong convictions against capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

NEBRASKA PETTY, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

A. I do.

The Court: Step down.

(Prospective juror excused.)

JACQUELINE B. THREATT, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. You do? What do you mean?

A. I don't believe in capital punishment.

Q. Say that again.

A. I feel very strongly aginst capital punishment.

The Court: Step down, please. Call another juror.

350 MARY GORSKI, prospective juror:

352 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do, your Honor.

The Court: All right, step down.

365 ANNA L. HOHNWALD, prospective juror:

366 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. Step down, please.

Since there were 8 veniremen removed for cause in violation of *Witherspoon* standards, and the State had only 4 peremptory challenges remaining, there were at least 4 prospective jurors that the State could not have removed peremptorily.

The holding of the court below is not only factually unsound but legally unsound. Error under *Witherspoon* is not excused simply because the prosecution has sufficient peremptory challenges to remove all such jurors. *In re Anderson*, 73 Cal. Rptr. 21.

The death penalty at bar should be summarily vacated.

CONCLUSION.

This case is unique.

Seldom if ever is a death penalty case affirmed with a dissenting opinion. Even rarer is a dissenting opinion in a death case that the defendant was not proven guilty beyond a reasonable doubt. (App. 13a-14a.)

The concealment of exonerating evidence from an accused whose ignorance of its existence precludes a request cannot be constitutionally tolerated, nor can threshold foreclosure of cross examination.

Victory at any price cannot be allowed to supplant the command of Canon 5 to "see that justice is done."

Moreover, we know of no case in which a weapon totally unconnected with the accused, admittedly unconnected with the death charged in the indictment, was used to obtain a death penalty in a trial in which the accused literally proved his innocence.

Petitioner prays that your Honors will consider his complaints to be of sufficient constitutional magnitude to warrant this Court's review.

Respectfully submitted,

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June 19, 1969

APPENDIX

Opinion of the Supreme Court of Illinois

Mr. Chief Justice Solfisburg delivered the opinion of the court:

In May, 1964, the defendant, Lyman Moore, was tried for the crime of murder. Following a jury trial in the circuit court of Cook County he was found guilty and sentenced to death. He appeals his conviction directly to this court contending that he was denied a fair trial and that he was not proved guilty beyond a reasonable doubt, and also appeals the denial of his petition for post-conviction relief.

On April 25, 1962, at approximately 10 P.M. two men were drinking in a tavern owned by Bernie Zitek in the village of Lansing, Illinois. One of these men began using profane language and, as a consequence, was forcibly removed from the premises by the owner. Present at this time was Patricia Hill, a waitress, and approximately seven other customers. One hour later a man rushed into the tavern, approached the bar, and shot Bernie Zitek in the chest with a shotgun, causing his death. The assailant immediately fled from the premises. Present at the time of the shooting were Patricia Hill and four customers who were playing cards at a table in the corner.

On October 31, 1962, a Chicago police officer was on patrol when the occupants of a 1957 Ford automobile shot at him and then fled from the car. The car was staked out by the police and the defendant and another man were arrested some time later as they were attempting to enter the car. The defendant and his companion were then taken to the Burnside Police Station. Later that night the de-

fendant was placed in a line-up at the station at which time he was observed by Patricia Hill, the waitress at Zitek's tavern. It is not clear from the record whether an identification was made at this time or on the following day, November 1, 1962, when a second line-up was held at which time Mrs. Hill identified the defendant as the slayer of Zitek. Although several other persons viewed the line-up with Mrs. Hill, including at least two of the men who had been playing cards at the time of the shooting, only Mrs. Hill was able to identify the defendant as the assailant at this time. At the time of his trial, however, one of the customers who had been present at the shooting identified the defendant as the assailant.

The defense at the time of the trial was mistaken identity and alibi and defendant adheres to this defense in this appeal, and contends he was not proved guilty beyond a reasonable doubt.

In support of this contention defendant insists that the witness, Patricia Hill, was honestly mistaken. However, Miss Hill positively identified defendant, both in a police line-up and at the trial, as the man ejected from Zitek's tavern who returned to kill him. The lighting was good and she was only six feet from the defendant, and had ample opportunity to observe him earlier in the evening.

Henley Powell also testified at the trial positively identifying defendant as the man who shot Zitek. One Virgle Sanders testified that two days after the shooting he had a conversation in the Ponderosa Tavern with the defendant who told him that it was open season on bartenders, and that he had just shot one in Lansing. Two other witnesses identified defendant as the man with Sanders in the Ponderosa Tavern.

(Supreme Court Opinion)

It is well settled that the positive identification of one witness, if credible, is sufficient to convict. (*People* v. *Brinkley,* 33 Ill. 2d 403; *People* v. *Donald,* 29 Ill. 2d 283.) The mere fact that others were present at a line-up and failed to identify the accused does not require reversal. *People* v. *Macias,* 39 Ill. 2d 208.

We have carefully examined the evidence and considered the opportunity of the witness to observe and the discrepancies in the testimony and find that the identification of the accused was sufficient to justify a conviction. Defendant's eloquent argument concerning the inherent problems of human identification would be more appropriate if addressed to the trier of fact.

Upon all the evidence the jury was justified in finding defendant guilty beyond a reasonable doubt.

We next turn to alleged error which defendant claims occurred at the trial. As previously stated, defendant was arrested on October 31, 1962, six months after the crime, when police were shot at and later saw two subjects running from a car. The car was staked out for five or six hours and the defendant and another man were arrested when they again approached the automobile. The police arrested the defendant and found a .38 caliber revolver at defendant's feet, a shoulder holster on his person, and a .16 gauge shotgun in the back seat of the car. The .38 caliber revolver and the shoulder holster were marked as exhibits and the State sought to introduce them. The evidence was ruled inadmissible and the jury instructed to disregard it. The .16 gauge shotgun was admitted into evidence although it was not positively identified as the death weapon.

(Supreme Court Opinion)

Defendant claimed that he was prejudiced by the evidence of the circumstances of his arrest, the display of the revolver and shoulder holster, and the admission of the shotgun into evidence. We do not agree. We think that despite the length of time between the crime and the arrest, testimony regarding the circumstances of the arrest was admissible, including testimony relating to the weapons found in defendant's possession or control at the time of the arrest. (*People* v. *Wright*, 30 Ill. 2d 519; *People* v. *Anderson*, 17 Ill. 2d 422; *People* v. *Davis*, 14 Ill. 2d 196; *People* v. *Jackson*, 9 Ill. 2d 484, 492; *People* v. *Smith*, 413 Ill. 218; *People* v. *Durkin*, 330 Ill. 394.) Since possession of the revolver and shoulder hoster were proper areas of testimony, and the items were not admitted into evidence and the jury was instructed to disregard them, we find no reversible error. (*People* v. *Holt*, 28 Ill. 2d 30; *People* v. *Carvin*, 20 Ill. 2d 32; *People* v. *Prohaska*, 8 Ill. 2d 579.) There is no clear evidence of the weapon actually used in this homicide, although it is clear that it was a shotgun. We have consistently held that a weapon found upon a defendant suitable for the commission of the crime charged is proper evidence even though there is no showing that it was the actual weapon used. *People* v. *Magby*, 37 Ill. 2d 197; *People* v. *Ostrand*, 35 Ill. 2d 520; *People* v. *McCasle*, 35 Ill. 2d 552; *People* v. *Lenhardt*, 340 Ill. 538.

The defendant further contends that the cross examination of the two identifying witnesses, Patricia Hill and Henley Powell, was unduly restricted. We have carefully examined the testimony of both Hill and Powell and their cross examinations, and the rulings on objections to the cross examinations, and we find no evidence that the trial judge abused his discretion in restricting it to matters

which explained, modified or discredited earlier testimony. *People* v. *Welch*, 22 Ill. 2d 558, 560; *People* v. *Moretti*, 6 Ill. 2d 494.

It is also argued that the prosecutor's closing argument was prejudicial in that he accused defense counsel of making a statement that was not true and stated that one of the witnesses was "scared to death" of the defendant. The latter remark was promptly stricken and the jury instructed to disregard it. We have examined the prosecutor's remarks regarding the misstatements of defense counsel and, while we consider them inappropriate, they were in response to equally inappropriate remarks of the defense. In examining the arguments as a whole we find no reversible error.

The last contention of the defendant concerning trial error regards an alleged oral instruction to the jury. The jury was given complete written instructions as requested and tendered by both the prosecution and the defendant fully covering the case, and the trial court further stated to the jury orally: "Now, in a murder case, the jury has the duty to determine first whether the defendant is guilty or not guilty. If you decide he is not guilty that ends the case. If you decide he is guilty of murder then you must next determine whether or not you wish to return a verdict of death. If you decide on a verdict of death you will so indicate in your verdict. If you have determined the guilt of the defendant and decide against a verdict of death you will return a verdict of guilty and the Court will fix the term of punishment."

While it is true that we have earlier held that instructions to a jury in a criminal case must be written, (*Ellis* v.

People, 159 Ill. 337,) this does not prevent a trial judge from making a brief explanatory statement of the forms of verdict that in no way contradicts the written instructions. We do not believe that this brief statement given here amounted to an oral instruction by the court and it clearly could not have prejudiced the defendant. *People* v. *Lamphear,* 6 Ill. 2d 346; *People* v. *Bydalek,* 381 Ill. 330.

Having examined the complete record in this case it is our conclusion that the defendant received a fair trial and that the evidence adduced justified the jury verdict finding him guilty beyond a reasonable doubt.

We next consider defendant's contention relating to his post-conviction petition. The gist of the allegations in the petition are that there was an unconstitutional concealment of evidence by the State and there was knowing use of perjured testimony by the prosecution. The alleged concealment involves police efforts to locate a man named "Slick". Virgle Sanders identified the man at the bar in the Ponderosa Tavern as a man he knew only as "Slick". It appears from the post-conviction hearing that in the course of the lengthy police investigation the police questioned a certain William Thompson who knew a "Slick," but he failed to identify Moore as the man he knew as "Slick". There was also a raid by the Lansing police on Wanda and Dell's Tavern in an attempt to find "Slick". Delbert Jones, the owner of the tavern, said he knew a "Slick" and could identify him but he was not there. After Moore was arrested the police did not contact Delbert Jones for identification and defense counsel were not informed about the raid on Wanda and Dell's Tavern at the time of trial. It also appears that the Lansing police had

the name of a James E. Watts in their files who was known as "Slick". There is no evidence however, that James E. Watts was the man who talked to Virgle Sanders or was in the Ponderosa Tavern.

None of the items allegedly concealed by the prosecution were requested by the defendant during the trial. It is clear that in a post-conviction hearing the burden is upon the defendant to show a denial of a constitutional right by a preponderance of the evidence (*People* v. *Evans,* 37 Ill. 2d 27), and the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material. (*Brady* v. *Maryland,* 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194.) We have examined the record on the post-conviction hearing and we do not believe that the defendant has shown by a preponderance of the evidence that the prosecution suppressed material evidence favorable to the accused which had been requested by the accused. The record discloses that the assistant State's Attorney at the trial showed his entire file to the defense attorney and no further request for disclosure was made. To sustain defendant's contention would be to require the prosecution to fully report every detail of lengthy police investigation including the following up of useless leads and discussions with immaterial witnesses. We conclude that defendant was deprived of no constitutional right because of any suppression of evidence by the prosecution.

Defendant next contends that the testimony of Virgle Sanders and Henley Powell was perjured and knowingly used by the prosecution. We find nothing in the record to clearly indicate that the testimony of either Sanders or

Powell was perjured and certainly it does not appear that any error in the testimony was known to the prosecution. Sanders testified that the defendant was the man he knew as "Slick". Even though it appears that he said he had met Slick at a time that Moore was in fact in prison, and that other people did not know Moore as "Slick", and the fact that Sanders had first stated that the man he knew as "Slick" was about 30 or 40 pounds heavier than Moore does not indicate perjury, but mere testimonial inconsistency. The only argument as to Powell's testimony was that it is contradicted by one of the defense witnesses, Donald O'Brien, and there was evidence that Powell was mistaken as to which direction he was facing at the card table when he viewed the defendant. Such contradictions in testimony go to the weight of the evidence and do not in any way indicate perjury. We therefore conclude that there was no such use of perjured testimony at the trial as to deny the defendant his constitutional rights, and the post-conviction petition was properly denied.

After the oral argument of this case the United States Supreme Court in *Witherspoon* v. *Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, held exclusion of jurors simply on the ground that they had scruples on capital punishment, without further inquiry to determine whether the juror could vote to inflict a death sentence, deprives a defendant of his right to a trial by a fair and impartial jury.

On *voir dire* in this case each juror was asked in substance: Do you have any religious or conscientious scrupsle against the infliction of the death penalty in the proper case? Twelve jurors positively asserted that they had

such scruples and were excused for cause without motion by the State or objection by the defendant.

The tenor of the entire examination, however, was unlike *Witherspoon* where the trial court promptly removed all who expressed the slightest qualms about capital punishment. The effort of the court to select a fair and impartial jury is indicated by the examination of prospective juror Conner:

"The Court: Q. Did you say Mr. Conner, that if you determine first, that the defendant is guilty and then you are to determine whether you should render a verdict of death that you couldn't consider that?

A. I said that I was one hundred percent for punishment, but if a man has to take another life to punish him, then I don't feel that I could be justified in taking it.

Q. In other words, you don't believe in capital punishment?

A. If that's what it amounts to.

Q. No, no. I'm asking you. I asked you, did you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. In a proper case, no, I don't have any objections and I could sign a death penalty in a proper case.

The Court: Well, I'm not going to remove him."

The court also conducted the following examination of prospective juror Nakata:

"Q. Likewise, you can't be a juror unless you, when you're sworn, and you are sworn to respect and observe the law.

A. That's the reason why I would like to give my reasoning right now, before I perjury myself about

that personally, because I can't go all the way on capital punishment.

Q. You can't go all the way?

A. No.

Q. Where do you stop?

A. It depends on the kind of crime it is and the evidence presented for it.

Q. Oh, that's all we are asking you to do.

A. Well, it seems to me, from the statements made by the prosecutng attorney, that he is going to ask for the death penalty, so, in view of that fact, I think I should disqualify myself.

Q. If he asks for it, it doesn't mean that you have to give it to him.

A. Of course, that's true, too. But, at the same time, though, I mean, I wouldn't be applying the law, as he stated it, you see, upon his presentation of the evidence, and all that, so I don't think I would be fair to the court or to the rest of the jurors by my being on the jury.

The Court: Step down, then, if you don't think you can be fair. I'm not going to ask you to try any further. The only question is, we want you to be fair and impartial."

In *People* v. *Speck*, 41 Ill. 2d 177, we held that the exclusion of jurors with scruples against the death penalty did not necessarily void the infliction of the death penalty. We there said: "The circumstances under which the *voir dire* examination here was conducted were quite different from those in *Witherspoon*. In that case the court noted that the tone was set when the trial judge said early in the *voir dire*, 'Let's get these conscientious objectors out of

the way without wasting any time on them.' In this case there was no hint of a desire for haste or for a perfunctory examination to see how many jurors could be disqualified on the statutory basis alone. On the contrary, the tone of the proceedings here indicated a sincere desire on the part of the prosecutor and the court (although perhaps not shared by the defense) to determine the jurors' qualifications according to the standard later held acceptable in *Witherspoon*."

It is also clear that in this case the State had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*. We conclude that, because of the tenor of the examination and the availability of peremptory challenges, *Witherspoon* does not apply. See *People* v. *Mallett*, No. 39071.

We stated in *Speck*: "Whether one accused of crime has been afforded due process is not to be determined by inquiring as to whether certain formal language has been used; rather, the inquiry is whether the defendant has received a fair trial. We are satisfied that the court exerted every effort to insure the defendant's right to a trial by a fair jury, and we hold that the exclusion of certain jurors who stated that they had conscientious scruples against capital punishment did not deny the defendant a fair trial. See *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20, 27."

We have fully considered the numerous contentions advanced by the defendant and are of the opinion that his guilt was established beyond a reasonable doubt and that he received a fair trial. The judgments of the circuit court of Cook County are affirmed. The clerk of this court is di-

rected to enter an order fixing Friday, March 28, 1969, as the date on which the original sentence of death entered in this circuit court shall be executed. A certified copy of this order shall be furnished by the clerk of this court to the Sheriff of Cook County.

Judgment affirmed.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

MR. JUSTICE SCHAEFER, dissenting:

The case against the defendant consisted of the following: (1) The identification of the defendant by the waitress, Patricia Hill, as the ejected customer who returned to the tavern and shot Bernie Zitek. (2) The identification of the defendant, by Henley Powell, as the man who came into the tavern and shot Bernie Zitek. Powell had not been in the tavern when the customer was ejected. (3) The identification of the defendant by Virgle Sanders as the man, nicknamed "Slick", who bragged of having shot a bartender in Lansing. Two other witnesses testified that the defendant was present in the Ponderosa Tavern at the time of the alleged bragging to Sanders, although they did not hear it.

The trial judge sustained prosecution objections to questions put to Patricia Hill as to when she had next seen the defendant after the date of the murder. The questions were clearly designed to elicit the circumstances under which she had identified the defendant. The objections were sustained on the ground that the questions went "beyond the examination in chief." Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the defendant by Henley

Powell were sustained. These rulings were erroneous, for the circumstances of an identification clearly relate to its weight. With regard to Patricia Hill, the prosecution attempted to cure the error by eliciting from her on rebuttal the fact that she had viewed lineups on October 31, 1962, and on November 1, 1962. So far as Henley Powell was concerned, the prosecution made no attempt to correct the error.

Donald O'Brien testified that the defendant was not the man ejected from Zitek's tavern. O'Brien was playing cards with Henley Powell and others when the shot was fired. His back was to the bar and the door and he did not see the killer, although he ran out the door after him. O'Brien also testified that Patricia Hill was the only one of 7 persons who had been in Zitek's tavern ~~that night~~ who identified the defendant in the November 1, 1962, line-up. None of those other persons, including the other participants in the card game, was called as a witness.

The defense presented the uncontroverted and unimpeached alibi testimony, unmentioned in the majority opinion, of the head bartender and the general manager of the Westmoreland Country Club in Wilmette. Both testified, and the employment records of the Club showed, that the defendant was employed as a cocktail waiter until after midnight on the night of April 25, 1962, the date of Zitek's murder. He was paid overtime for that work.

On this record, in view of the strong alibi evidence, the testimony of O'Brien, the successful effort of the prosecution to conceal the circumstances under which its witnesses first identified the defendant and the failure of the prosecu-

tion to account for those who did not identify the defendant, I am unable to conclude that the defendant's guilt was established beyond a reasonable doubt.

I am also unable, for several reasons, to agree with the majority that the 16-gauge shotgun seized at the time of the defendant's arrest was properly admitted into evidence. In the cases cited by the majority no ballistic evidence was available, and therefore the suitability of the weapon for the commission of the crime charged could be established only by a physical description. In this case, however, the prosecution had ballistic test results in its possession throughout the trial which showed that Zitek was shot with a 12-gauge shotgun. The shotgun received in evidence was thus as unsuitable for the commission of this murder as was the excluded .38 caliber revolver. Furthermore, the ballistic evidence was admitted by stipulation only at the close of the defendant's case, after the prosecution had persistently resisted defense attempts to bring it out and after the shotgun had been received in evidence. Finally, there was no proof that the shotgun was in the possession or control of the defendant. It was discovered 6 months after the commission of this crime in a car that belonged to someone other than the defendant. No use of, or access to, that car by the defendant was shown. Under identical circumstances this court reversed another death sentence, saying, "We have found no case upholding the admission into evidence of weapons not proved to be in the possession or under the control of the defendant." (*People* v. *Smith,* 413 Ill. 218, 221.) That ruling should be applied in this case.

At the post-conviction hearing the defendant introduced a statement that Virgle Sanders had given to the Lansing

police on April 30, 1962, in which Sanders stated that he had met "Slick" "about six months ago." The defense did not learn of that statement until after the trial. When confronted at the post-conviction hearing with the fact that the defendant had been incarcerated in a Federal penitentiary until March 4, 1962, Sanders admitted that it was impossible that the defendant was the man who had bragged that he had shot the bartender. The F.B.I. report which showed the date of the defendant's release from Leavenworth was received by the Lansing police officers shortly after the defendant's arrest and was in their possession throughout the trial. Sanders' identification was further impugned by the fact that he did not see the defendant again after his alleged encounter with "Slick" until the day of the trial some 25 months later. At that time, when he first saw the defendant, he stated that "the guy that I knew as Slick looked to me to be about thirty or forty pounds heavier . . . and he didn't wear glasses." He testified that one of the officers replied, "Well, you know how jailhouse beans are."

Sanders testified at the post-conviction hearing that he remembered "Slick" as the man he knew from Wanda & Dell's Tavern who nearly became involved in a fight with a Willie Thompson. William Thompson also testified at the post-conviction hearing. He was acquainted with a "Slick" from Wanda & Dell's Tavern and was involved in the altercation mentioned by Sanders. In early November of 1962 the Lansing police showed him a number of photographs, including one of the defendant, but he was unable to identify any of them as the "Slick" that he knew. He was never called to view a line-up or to testify at the defendant's trial. Subsequent to the trial, Thompson was shown a series of photographs of James

E. ("Slick") Watts which he identified as photographs of the "Slick" he knew.

At the post-conviction hearing it was also brought out that on April 30 or May 1, 1962, the Lansing police had staged a raid of Wanda & Dell's Tavern in search of "Slick." Delbert Jones, the owner, testified that he then told the police that he could identify the "Slick" who frequented his tavern, but he was never contacted for that purpose. Jones testified that he had been shown a picture of the defendant and that the defendant was not "Slick". At the post-conviction hearing he identified a photograph of "Slick" Watts as the "Slick" who had frequented his tavern.

During the entire investigation of the Zitek murder the Lansing police suspected "Slick" Watts as the assailant and assigned a lieutenant to search for him. Thus there is convincing evidence that the defendant is not the man who had bragged to Sanders, and despite the majority's assertion to the contrary, there is substantial evidence that "Slick" Watts, and not the defendant, was that man. None of this exculpatory evidence was disclosed to defense counsel.

The defendant's conviction rests entirely upon identification testimony. The facts developed at the post-conviction hearing seriously impeached, if indeed they did not destroy, Sanders's trial testimony. Had those facts, and the identifications of "Slick" Watts by Thompson and Jones, been available at the trial, the jury may well have been unwilling to act upon the identifications of Patricia Hill and Henley Powell. Far more is involved in this case, in my opinion, than "the following up of

useless leads and discussions with immaterial witnesses." Certainly if Sanders's identification was material, the F.B.I. report and the testimony of the other witnesses which destroyed that identification were also material. Consequently, I believe that the State's nondisclosure denied the defendant the fundamental fairness guaranteed by the constitution. *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194; see *United States* v. *Wilkins* (2d Cir. 1964), 326 F. 2d 135.

The majority, however, disposes of this issue upon the ground that the defendant failed to request the evidence which was suppressed. This ground is neither factually nor legally sound. Prior to the trial the defendant had demanded copies of the grand jury minutes and of all statements made to the Lansing police. The motion was allowed only to the extent of providing the defendant with the statement of each witness who testified at the close of his direct examination. No statement of Virgle Sanders was supplied. Although, as the majority points out, the prosecuting attorney offered his file to the defense at the trial, that attorney was unable to recall whether the items here involved were in that file. The defendant's attorney testified that none of these items was disclosed to him.

Moreover, despite the language in *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, I do not believe that the Supreme Court intended to establish a request as an indispensable prerequisite to disclosure by the prosecution. Prior to *Brady* many courts had recognized the duty of the prosecution to disclose favorable, material evidence to the defense. And in many of those cases the defense did not know of the evidence and so

had failed to request it. (*Mooney* v. *Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340; *Pyle* v. *Kansas*, 317 U.S. 213, 87 L. Ed. 214, 63 S. Ct. 177; *United States* v. *Dye* (3d Cir. 1955), 221 F. 2d 763; *United States* v. *Baldi* (3d Cir. 1952), 195 F. 2d 815.) In *Brady* the Supreme Court acknowledged the long-standing duty that rested upon the prosecution. In doing so, it used language appropriate to the decision of the case before it. Without an explicit holding to the contrary, I cannot believe that the Supreme Court intended to narrow the duty of the prosecution as it had existed prior to *Brady* by making that duty contingent upon a request when the defense is ignorant of the existence of the suppressed information. Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose. *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 215, 83 S. Ct. 1194; *Barbee* v. *Warden, Maryland Penitentiary* (4th Cir. 1964), 331 F. 2d 842; *United States* v. *Wilkins* (2d Cir. 1964), 326 F. 2d 135.

Whether or not the prosecuting attorneys were aware of the existence of the withheld evidence in the files of the Lansing police department is immaterial, for the prejudice to the defendant is identical whether the evidence is withheld by the prosecutor or by the police. What was said by the United States Court of Appeals for the Fourth Circuit in *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842, is applicable here: "Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information

is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. 'The cruelest lies are often told in silence.' If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging. The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused. We cannot condone the attempt to connect the defendant with the crime by questionable inferences which might be refuted by undisclosed and unproduced documents then in the hands of the police."